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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 451

MOSES JOSEPH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting Writ	5
Relief Sought	14
Appendix—Opinion of Court of Appeals	15

CITATIONS

Himmelfarb v. US., 175 F.2d 924	13
Glasser v. U.S. 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680	13
Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 and 146 A.L.R. 357	5, 6, 14
Cruzado v. People, 210 F.2d 789	6
Fukunaga v. Hawaii, 33 F.2d 396	6
Snyder v. Mass., 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674	8
Cox v. U.S., 96 F.2d 41	10, 11
Wiborg v. U.S., 163 U.S. 632, 16 S. Ct., 1127, 41 L. Ed. 289	10
Edwards v. U.S., 7 F.2d 357	10
People v. Ley, 336 Mich. 77	10
Manning v. U.S., 215 F.2d 945	10
Forte v. U.S., 94 F.2d 945	11
Ryan v. U.S., 99 F.2d, 864	10

Page

Mattox v. U.S., 15 S. Ct., 337, 156 U.S. 237 39 L. Ed. 409 11
Greene v. McElroy, 79 S. Ct., 1400, 360 U.S. 474, 3 L. E. 2d 1377 11
Quercia v. U.S., 289 U.S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 11
Ayres v. U.S., 58 F.2d, 607 11
People v. Timmons, 300 Mich. 653 12
Brown v. U.S., 234 F.2d 140 12

STATUTES AND CONSTITUTIONAL PROVISION

Title 18, Sec. 1001, U.S.C. 3
Title 18, Sec. 3771 and 3722 8

MISCELLANEOUS

6th Amendment of the Constitution of the United States of America 8

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OPINION BELOW

The opinion of the Conurt of Appeals 6th Circuit, is reported at —— F20, ——. A copy of the opinion is printed as an appendix to this Petition.

JURISDICTION

The opinion of the Court of Appeals was filed on the 30th day of June, 1964. Petition for rehearing was denied on August 11, 1964. The jurisdiction of the Court is invoked under the Rules of the Supreme Court and Title 18, Sec. 3771 and 3772.

QUESTIONS PRESENTED

I.

The Trial Court erred in denying the Petitioner his right to be confronted by the witnesses against him under the Sixth Amendment of the United States Constitution?

II.

The Trial Court erred in convicting the defendant without proper proof being offered by the Government of the *Corpus Delicti Aliunde* admission of the Petitioner?

The Lower Court says "No."
The Petitioner says "Yes."

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Sixth Amendment to the Constitution of the United States of America.

STATUTES INVOLVED

Violation of Section 1001, Title 18, USC.

STATEMENT OF THE CASE

Petitioner was charged and convicted of violating Section 1001, Title 18 U.S.C., by knowingly making a false statement in an application for a Radio telephone operator's permit to the Federal Communications Commission.

This application was filed on Sept. 4, 1957. The falsity consisted in the answer to a question on former criminal convictions. The defendant answered "no" when as a matter of fact he had been convicted in state courts.

The defendant waived trial by jury (4a).

At the start of trial, the Government counsel offered in evidence "in line with our pretrial conferences on this matter" (5a) three exhibits; Exhibit One was the application filed by the defendant referred to herein. Exhibit Two was a photostatic copy of a page from the Law Journal certified to by Edward Branigan, Clerk of the Wayne County Circuit Court, Michigan, showing a conviction of the defendant in 1930 for Robbery Armed; and Exhibit Three a similar record of a state Court conviction of conspiracy in 1950.

The Government counsel offered these exhibits in evidence and they were received without any objection by the defense attorney (6a).

Government counsel then asked "And I believe it is indicated that these records all relate to the defendant, Moses Joseph"?

Defense counsel answered, "That is right" (6a).

The Government then called Howard Looney, Chief of the Operator and Examination Branch of the Federal Communications Commission (7a) who identified Exhibit One as a standard form (FCC Form 753-1) of his Agency. He also identified as Exhibit Four, an extract from the manual issued by the Field Engineering Bureau of the FCC (10a) namely, paragraph 61.43 covering newly disclosed criminal record (11a) and outlining procedures to be followed by the Field Offices of the FCC. The witness identified Exhibit One as an application handled by the Detroit Field Office (9a). He testified his office became aware of the mis-statement in the application in 1962 (14a). He stated that the FCC did not take any action to suspend the defendant's license even though it had the authority to do so under Sec. 303 (m) (1) of the Federal Communications Act (17a) (18a). He said no final decision had been made by the Commission (19a).

The Government rested (21a). No motion for judgment of acquittal was made by the defense. The defendant was then sworn as a witness and, while admitting the filing of the application (28a), and admitting his prior convictions (22a, 23a, 24a, 25a) he denied making a false statement "wilfully and knowingly" and stated he misunderstood the meaning of the question (28a) (29a) and that he had acted in good faith and had never received any complaint from the FCC for any misconduct from 1957 until his arrest in 1962 (29a) (30a).

The defense then rested, making no motion for judgment of acquittal.

The Court after argument of counsel for both sides, found the defendant guilty (48a) and later sentenced him to eighteen months in prison (50a). The Trial Court denied

bond pending appeal and a claim of appeal was immediately filed and the defendant was admitted to bail by the Court of Appeals.

On June 29, 1964, the Court of Appeals affirmed the decision of the District Court and denied a motion for rehearing on August 11, 1964.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals should be reviewed because it erroneously interprets the rights of the Petitioner under the 6th Amendment to the Constitution of the United States.

First: The Petitioner had a right to be confronted by the witnesses against him.

Second: The waivers by defense counsel were invalid in the absence of express authority by the Petitioner for such waivers and a showing on the record of a consideration and determination of such authority by the Trial Court.

Should not the doctrine of the *Johnson* case be applied by this court in this case? And should not the trial court be required here to follow the procedure the Supreme Court required in the *Johnson* case? *Johnson v. Zerbst*, 304 U.S. 458; 58 S. Ct. 1019, 82 L. ed. 1461, 146 ALR 357.

The Supreme Court in substance said that the circumstances of each individual case determined whether a proper waiver has occurred. A waiver involves the intentional relinquishment or abandonment of a known right or privileges; and a *strong presumption* is raised against the waiver of fundamental rights by an accused: his constitutional rights are jealously and vigilantly guarded and the record should reflect the express waiver by the accused.

The record in this case is barren of any showing of an express waiver by the appellant or any express authority given to his attorney, or of any intimation that he was aware of or consented to the stipulations entered into in pre-trial conferences between government and defense counsel. There was only his silence.

If the Supreme Court ruling in the *Johnson v. Zerbst* case, *supra*, is to be given any effect whatsoever, it would appear that the trial court in this case should have made an inquiry of the appellant as to his knowledge and consent to the waivers made by his counsel and such inquiry and determination should appear on this record. Regardless of how the trial court and this Honorable Court of Appeals regards the importance of the evidence waived, or what ultimate effect it might have had on the final judgment, a waiver of a constitutional right was involved and the trial court should have followed proper procedure in line with the *Johnson* doctrine.

Further, we suggest the authorities cited by the Court of Appeals in affirming the judgment below are distinguishable from this case.

The Court of Appeals cites *Cruzado v. People*, 210 F.2d 789 (CA 1, 1954) and *Fukunaga v. Territory of Hawaii*, 33 P. 2d 396 (CA 9, 1929). In the *Cruzado* case, the defendant did not dissent to his counsel and the prosecuting attorney presenting a stipulation before the Court that the case against *Cruzado* for the offense of assault with the intent to murder should be submitted to the Trial Judge upon the evidence that had been introduced by the prosecution and the defense at a former trial before the *same Trial Judge*, wherein the charge was identical, namely, assault with intent to murder. The evidence covered by the stipulation included the entire direct and cross examination and re-direct examination of each of the witnesses for both

sides. The trial court accepted the stipulation and later pronounced judgment against the defendant. The Court of Appeals held that under the record as outlined the judgment of the trial court should be affirmed. The Court of Appeals said in its opinion (P. 791): that even the subordinate purpose of the right of confrontation, namely, weighing the credibility of witnesses, was served and often relinquished by the accused in that instance because the judge who tried *Cruzado* pursuant to the stipulation was the same Judge who had heard the witnesses testify at the former trial.

Appellant believes that a comparison of the record before the Court of Appeals in the *Cuzardo* case with the record before the Court of Appeals in the case at bar should preclude any *general* application of the reasoning in the *Cruzado* case to this case. In *Cruzado* the trial court had before it a transcript of the testimony of all the witnesses under both direct and cross examination together with any physical exhibits that may have been introduced. In *Cruzado*, the trial Judge had a record of a judicial proceeding wherein the forms of procedure which are the essence of an opportunity to defend, were followed. In the present case, the trial court had before it certain exhibits which had been talked about in pre-trial proceedings, consisting principally, of informal conferences between the government counsel and defense counsel in the U.S. Attorney's Office, defendant not being present during such conferences.

We believe that it is prejudicial to a defendant to generally apply a doctrine, applicable in one case, to another matter wherein the record is totally different.

In *Fukunaga* the record is entirely dissimilar from the present case.

As a matter of fact the decision in *Fukunaga* was predicated principally on the grounds that *no federal question*

was involved; the defendant having been convicted of murder in the territorial court of Hawaii. The Court of Appeals—as a corollary to the main question—did hold that the age of the defendant (20 years) did not affect the right of his counsel to waive. The Court said this question had not been raised before the trial court and in any event it would not be a federal question.

Appellant contends the opinion of the Court in the *Fukunaga* case cannot be given general application here in the light of this record.

Here we are complaining of the failure to employ proper constitutional procedures in a Federal District Court, and the failure of such Court to preserve this appellant's fundamental rights in a case involving the commission of a purely federal statutory crime.

Amendment VI reads in part as follows:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *"

In *Snyder v. Massachusetts,* 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674, Justice Cardozo said:

> "The law, as we have seen, is sedulous in maintaining, for a defendant charged with crime, whatever forms of procedure are of the essence of an opportunity to defend. Privileges, so fundamental as to be inherent in every concept of a fair trial, that could be acceptable to the thought of reasonable men, will be kept inviolate and inviolable; however crushing may be the pressure of incriminating proof."

At the outset of the present case, by the Trial Court's allowance of the stipulation of Government and defense counsel growing out, apparently, of pre-trial conferences

on the case, the "forms of procedure" referred to by Justice Cardozo, as the "essence of an opportunity to defend" were somewhat minimized, if not entirely eliminated.

When the Government offered Exhibit One, the application, in evidence, and it was received by the Court without defense objection, the defendant was completely deprived of his right to be confronted with the government witnesses who would testify to the filing and processing of the application and its approval in the ordinary course of business; and be afforded the opportunity to cross-examine these witnesses, test their credibility, and force the Government to assume its responsibility of bearing the burden of proof that the law places upon every prosecuting agency. If there was a basis or lack of basis for a reasonable doubt of defendant's guilt, it should have been established at the trial in an intra-judicial proceeding, and not have been predetermined in any pre-trial conference.

When the Government offered Exhibits Two and Three, the record of his prior convictions under certifications of state court officials, and the Court received these exhibits in evidence without defense objection, the defendant was likewise deprived of his right to face the witnesses who would testify to his convictions, and establish his identity as the person who was convicted and imprisoned. The credibility of their testimony could be tested by cross-examination, and the genuineness of the documents verified under oath.

The "opportunity to defend" was entirely swept away when Government counsel stated "And I believe it is indicated that these records all relate to the defendant, Moses Joseph"? and the Defense Counsel answered "That is right" (6a).

The Government's case thereupon was practically completed without a witness being sworn, without a scintilla of

identification of the exhibits or a vestige of proof from the witness stand of their authenticity.

In substance the Government by the introduction of Exhibits Two and Three were establishing part of their case by *exparte* affidavits of State Court officials. This is exactly the situation that the Sixth Amendment was designed to prevent.

The *Cox* case, (96 F. 2d 41) on page 43, under subheading 6 and 7, appears more applicable to the case at bar. The Court reversed the trial court, even after defendant's testimony and even though there was no ruling of the trial court of which he had any right to complain because of the record; citing *Wiborg v. United States*, 163 U.S. 632, 16 S. Ct. 1127, 41 L. Ed. 289.

In *Edwards v. United States* 7 F. 2d 357, the Court said (P. 360):

> "Regardless of the condition of the record, precluding any right of defendants to demand a review of alleged errors, * * * we have, in review of the somewhat extraordinary circumstances of these, exercised our inherent power to review the entire record * * *."

In *People v. Ley*, 336 Mich. 77, although the Court affirmed the conviction it was said on Page 82 that the trial court was in error in permitting testimony of admissions by the defendant to establish two elements of the *corpus delicti;* when no testimony sufficient to establish the entire *corpus delicti* had been given.

In *Manning v. United States*, 215 F. 2d 945, the Court while apparently liberalizing the rules on proof of *corpus delicti* still maintained the principle of independent evidence being required. See also *Ryan v. U.S.*, 99 F. 2d 864.

Forte v. U. S., 94 F. 2d 236, is more restrictive than the *Manning* case, *supra*, in that the conviction was reversed for lack of independent proof of the *corpus delicti*.

In *Mattox v. U. S.*, 15 S. Ct. 337, 156 U.S. 237, 39 L. Ed. 409, the Supreme Court, in discussing a similar provision under the Phillipine Bill of Rights, said:

> "This provision * * * intends to secure the accused in the right to be tried, so far as facts probable by witnesses are conceived, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte affidavits*, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination * * *"

The rights of confrontation and cross examination apply not only to criminal cases but also to administrative and regulatory tribunals. *Greene v. McElroy*, 79 S. Ct. 1400, 360 U.S. 474, 3 L. Ed. 2d 1377.

In *Quercia v. U.S.*, 289 U.S. 466, 53 S. Ct. 698, 77 L. Ed. 1321, it was stated that a trial judge is more than a moderator. He is charged with the duty of seeing that the law is properly administered and it is a duty that he cannot discharge by remaining inert.

It has been held that it is the responsibility of an appellate court to act in the public interest and guard against injustice and to reverse a conviction in the absence of a proper motion or exception. *Cox v. United States*, 96 F. 2d 41.

In *Ayers v. United States*, 58 F. 2d 607, the 8th Circuit Court of Appeals, regardless of the insufficiency of the

record, reversed a conviction to prevent a miscarriage of justice.

In the present case, appellant, regardless of what Justice Cardozo, *supra*, termed the crushing "pressure of incriminatory proof" was entitled to receive from the Trial Court in the public interest, as well as his own, protection from a trial by stipulation, deposition or affidavit, wherein the opportunity to defend would not be maintained. Otherwise, the whole judicial proceedings would take on the aspects of a plea of *nolo contendere*.

In *People v. Timmons*, 300 Mich. 653, (p. 661), the defendant was being tried for rape. His defense was an alibi. The Court Clerk was allowed, with the consent or waiver of defense counsel, to give hearsay testimony concerning an investigation of defense proofs. The Michigan Supreme Court said that the right of a defendant in a criminal case to be confronted with witnesses is an important right which should be safeguarded by the Court. Failure to do so was not overcome by consent of counsel.

The attitude of this Court of Appeals on the importance of cross examination and confrontation by witnesses is well set forth in *Broda v. United States*, 234 F. 2d 140.

In an opinion by Judge Allen concurred in by Judges Martin and Miller the Court, quoting *Wigmore*, said, "Cross examination is 'the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.'"

The Sixth Circuit Court of Appeals decided that in the case at bar that the appellant's right to be confronted by the witnesses against him under the Sixth Amendment may be "effectively waived by counsel in open court in the presence of an accused who indicates no dissent." This is

contrary, we believe, to the rule announced by the Supreme Court, and referred to later in this Petition.

It was admitted by government counsel in oral argument at the hearing before the Court of Appeals that arrangements for stipulations on evidence and waiver by defense counsel of important proof through live witnesses, were made in pre-trial conferences held for the most part in the office of the government counsel. All these arrangements were made in the absence of the defendant. It is true that the defendant was present in court when waivers were made by his retained counsel. He was silent, and the Court of Appeals considered his silence to constitute agreement and acquiescence in his lawyer's action.

This is contrary to the doctrine announced by the Supreme Court and adopted in *Himmelfarb v. U.S.*, 175 F.2d 924. In that case, the Court of Appeals (CA9) said (P.931) —while affirming conviction on other grounds—" • • • and it is plain that no stipulation of counsel waiving his client's constitutional right could be effective without the client's specific assent. In absence of express authority, an attorney has no power to surrender substantial legal rights of his client."

In *Himmelfarb*, the Court cited *Glasser v. U.S.*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, referring to the laxity of a trial court in protecting the fundamental rights of an accused and the resulting prejudice to the accused.

The Court in *Himmelfarb* further cited: *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461, 146 ALR 357, wherein the Supreme Court said "Whether there is a proper waiver should be clearly determined by the

trial court, and it would be fitting and appropriate for that determination to appear upon the record" (P. 932).

The Supreme Court in *Johnson v. Zerbst, supra*, reversed a conviction in a case involving the question of a waiver by a defendant of the right to counsel. Appellant maintains this case is of particular importance here since it involved the waiver of a constitutional right, under the Sixth Amendment. In this case the salient question likewise is the waiver of a constitutional right under the Sixth Amendment.

In summation, appellant maintains that this Court should grant a writ of certiorari of this case, particularly on the question of whether the waivers made by the defense counsel were valid in the light of the *Johnson v. Zerbst* doctrine; and whether the trial court followed proper procedures to preserve the fundamental and constitutional rights of the accused.

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

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Dated: Detroit, Michigan
August 24th, 1964.

APPENDIX

OPINION OF THE COURT OF APPEALS

Decided June 30, 1964

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MOSES JOSEPH, *Defendant-Appellant.*	On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: Weick, Chief Judge, Phillips, Circuit Judge and Brown, District Judge.

Per Curiam. Moses Joseph, the defendant-appellant, was convicted under an indictment in which he was charged with violating Title 18, U.S.C., Sec. 1001 in that he knowingly and wilfully made a false statement in an application for a radiotelephone operator's permit to the Federal Communications Commission. Specifically, it was charged that he, wilfully and knowingly, falsely answered "No" to a question inquiring as to the existence of a past criminal record.

Defendant, represented by retained counsel, waived a trial by jury. The Government opened its case by offering in evidence the application purporting to be signed by defendant and certified copies of two prior state court judgments of conviction of crimes. These exhibits were received in evidence without objection, after which Government counsel indicated that the exhibits related to defendant, to which defendant's counsel agreed. The Government then introduced certain other evidence, unimportant here, and rested.

Defendant then testified in his own behalf that he did execute the application and that the judgments of conviction did relate to him, but testified that he did not make

the false statement wilfully and knowingly in that he misunderstood the question and was acting in good faith.

The trial court found defendant guilty.

Defendant first contends that the receipt in evidence of the exhibits without authentication by witnesses, though without objection, and the stipulation by his counsel that the exhibits related to defendant deprived him of his 6th Amendment right to be confronted by witnesses.

The answer to this contention is that this right may be effectively waived by counsel in open court in the presence of an accused who indicates no dissent. *Cruzado v. People*, 210 F.2d 789 (C.A. 1, 1954); *Fukunaga v. Territory of Hawaii*, 33 F.2d 396 (C.A. 9, 1929), cert. denied 280 U.S. 593 (1929).

Defendant also assigns error on the ground that, he contends, there must be evidence establishing the *corpus delicti* independent of extra-judicial admissions of a defendant. The answer to this contention is, first, that the exhibits themselves, with the stipulation, did establish the *corpus delicti* and, second, that there was no extra-judicial admission of defendant admitted in evidence. Moreover, in *Opper v. United States*, 348 U.S. 84 (1954) it was held that the corroborative evidence need not be sufficient, independent of extra-judicial admissions, to establish the *corpus delicti* but need only be substantial and tend to establish the trustworthiness of the extra-judicial admission.

Accordingly, the judgment below is affirmed.